

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 21, 2009 Session

STATE OF TENNESSEE v. JOHNNY LYNN, aka JEROME ALVIN BUSS

Appeal from the Circuit Court for Perry County
No. 747 Jeffrey S. Bivens, Judge

No. M2008-00532-CCA-R3-CD - Filed June 25, 2009

The Defendant, Johnny Lynn, aka Jerome Alvin Buss, was convicted upon a Perry County jury verdict of two counts of rape of a child and two counts of aggravated sexual battery. For these convictions, the Defendant received an effective fifty-four-year sentence in the Department of Correction with 100% service required. In this direct appeal, the Defendant raises four issues for our review: (1) whether the trial court erred in allowing expert witness testimony from the nurse practitioner who examined the victim speculating about what children in general understand about their bodies and sex; (2) whether the trial court gave erroneous jury instructions when it stated the elements of child rape could be satisfied by a mental state of recklessness; (3) whether the evidence was insufficient to support the jury's verdict of guilty beyond a reasonable doubt on the charge of rape of a child; and (4) whether the trial court committed sentencing errors.¹ Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Trudy L. Bloodworth, Franklin, Tennessee, (at trial and on appeal) and Mark C. Scruggs, Nashville, Tennessee, (at trial) for the appellant, Johnny Lynn, aka Jerome Alvin Buss.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Jeffery L. Long, Assistant District Attorney General, for the appellee, State of Tennessee.

¹ For the purposes of clarity, we have renumbered and reordered the issues as stated by the Defendant in his brief.

OPINION

Factual Background

A Perry County grand jury indicted the Defendant for two counts rape of a child and two counts of aggravated sexual battery. See Tenn. Code Ann. §§ 39-13-504, -522. The allegations stem from three incidents where the Defendant allegedly sexually abused a child under the age of thirteen. A jury trial was held on August 8 and 9, 2007.

The victim, B.G.,² was sixteen years old at the time of trial. According to the victim, she lived with her family in Lobelville in approximately 2001 or 2002. She was around ten or eleven years old at the time. Also during that time period, her grandmother was married to the Defendant, and they lived nearby.

The victim testified that she visited with her grandmother and the Defendant on weekends and during summer vacation. The victim stated that she discussed the concept of “good touches” and “bad touches” with her mother and counselor and that she understood the difference. On one occasion, the Defendant, with his hand, touched the victim between her legs and on her chest, rubbing her on the outside of her clothing. This touching happened in the guest bedroom and master bedroom of the Defendant’s house.

When asked if she had seen the Defendant’s penis on another occasion, the victim responded affirmatively. According to the victim, she had seen the Defendant, in his master bedroom, pull his penis out of his pants and start “shaking [it] up and down.” She was lying on the bed and had on a t-shirt but no bottoms. After shaking his penis, the Defendant ejaculated on her stomach and then “licked it off.” The Defendant referred to the “white stuff” as “cum.”

The victim relayed that, on another occasion, the Defendant “stuck” his penis in her vagina, “put white stuff in [her,] and then licked it out” with his tongue. This occurred in the master bedroom and, again, she was wearing a blue t-shirt but no bottoms. The Defendant also took pictures of the victim. Two photographs identified by the victim were admitted into evidence depicting the Defendant inserting his penis into the victim’s vagina.

When asked why she did not tell anyone at this time, she responded that the Defendant told her he would kill her. She believed the Defendant and was afraid of him. Finally, after the family moved to Henderson in Chester County, the victim told her older sister, who in turn told her mother.

Sue Ross, a pediatric nurse practitioner with Our Kids Center, was next to testify for the State. She testified that she had been employed as a pediatric nurse practitioner since 1974 and recounted her educational background.

² In order to protect the identity of minor victims of sexual abuse, it is the policy of this Court to refer to the victims by their initials. State v. Schimpf, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989).

Ms. Ross personally conducted the physical examination of the victim in 2002, when the victim was eleven years old. The examination of the victim was normal, revealing no finding of injury. However, according to Ms. Ross, the vast majority of all exams are normal. In Ms. Ross' opinion, the normal results of the victim's examination neither confirmed nor discounted the possibility of sexual contact. She relayed that clear, incontrovertible physical evidence of penetration into the vagina appears in only three to five percent of cases.

On cross-examination, Ms. Ross confirmed that the victim did not mention penetration when interviewed. During redirect, she affirmed that the victim reported that the Defendant touched her "privates" with his hands, that he touched her genital area with his mouth, that he touched her upper thigh and abdomen with his penis, and that he ejaculated on her abdomen. The victim referred to it as "white stuff" on her stomach. The victim relayed during the interview that she was touched by the Defendant from ages nine to eleven. Finally on recross, Ms. Ross affirmed that, in the victim's medical history, it was reported that the victim unequivocally stated that the Defendant did not put his penis inside her.

The parties stipulated to the testimony of Marianne Dilman, a Polaroid employee. The stipulation pertained to the photographs admitted into evidence. The frame codes were analyzed to determine when and where the film was manufactured. Ms. Dilman reported that she deciphered one frame and that this film was manufactured in Waltham, Massachusetts on or about May 31, 2000. Two other frames came from film manufactured in Holland, Netherlands on or about April 24, 2002.

The Defendant testified on his own behalf. He relayed that, in 2001 and 2002, he had a rotator cuff injury, requiring surgery in 2001 followed by physical therapy. He had limited use of his right arm thereafter. The Defendant denied any sexual contact with the victim. He believed his ex-wife, the victim's grandmother, had coached her into making the allegations.

Debbie Quinn testified that she was the medical records director at Perry County Hospital. She confirmed that the Defendant's rotator cuff was torn on December 19 or 20, 2000, and that he had surgery on March 27, 2001. The Defendant received physical therapy until September 2001 to gain range of movement in his arm, and he returned for an evaluation in December 2001. He reinjured his arm and returned from June to July 2002. She acknowledged that physical therapy was for "improvement" but that the Defendant still had use of his arm during his therapy.

Following the conclusion of proof, the jury found the Defendant guilty as charged. At a subsequent sentencing, the trial court imposed terms of ten years for each aggravated sexual battery conviction and twenty-two years for each rape of a child conviction. The ten-year sentences were to be served concurrently with one another. The twenty-two-year sentences were to be served consecutively to each other and consecutively to the ten-year sentence, resulting in an effective fifty-four-year sentence with 100% service required.

The Defendant filed a motion for new trial, which was denied. This appeal followed.

Analysis

I. Expert testimony

The Defendant complains that the trial court erred in admitting the expert testimony of Sue Ross, the pediatric nurse practitioner who examined the victim. Specifically, the Defendant, citing to McDaniel v. CSX Transp., Inc., 955 S.W.2d 257 (Tenn. 1997), challenges Ms. Ross' testimony speculating on what "most children" understand about their bodies and sex.

The testimony at issue came when Ms. Ross was explaining the different types of penetration (oral, digital, and penile) and the types of injuries that may result from each kind of contact. When asked about examination findings following penile penetration, Ms. Ross responded, "I think with penile what you have to consider is—and even with digital—you have to go back and look at, what is it that this child understands about—and we're talking about a female—her body? Most children, even adolescents don't really have this thorough understanding of—" Defense counsel then objected to her opining on what most children understand about the human body and sexual contact, challenging the reliability of her opinion. The State then relayed that Ms. Ross was being offered as an expert for pediatric physical examinations and also for her experience with children in this area.

Ms. Ross was then further questioned about her expert qualifications, relaying that she had received specialized training in her field. She affirmed that she began working with Our Kids Center in 1990 and, since that time, she had performed approximately 4000 physical examinations of children who were allegedly the victims of sexual abuse. She also taught at Vanderbilt University Medical School, teaching residents how to conduct these examinations and how to interpret the results. The trial court then ruled that Ms. Ross was an expert in the area and could testify regarding the understanding of "most children" about types of sexual contact and their bodies.

Ms. Ross then testified about penile penetration, stating that if "true" penile-vaginal penetration occurs, then it is likely that there will be some physical findings in a prepubescent child. She explained the difference between penile-vaginal and penile-genital penetration, relaying that penile-genital penetration did not involve penetration "all the way into the vagina" but to children it "feels inside[.]" She also stated that with penile-genital penetration there may be no injury or evidence of any injury. She concluded, "So it really depends on what you're talking about, and it sort of goes back to what this child understands about their genitalia."

The State argues that this issue is waived because the Defendant failed to include it in his motion for a new trial. Generally, issues are waived if they are not presented in a motion for a new trial. See Tenn. R. App. P. 3(e); see also State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997). We must treat this issue as waived unless it is deemed to be plain error. Tenn. R. App. P. 52(b). When deciding whether plain error exists, we consider five factors:

- (a) the record must clearly establish what occurred in the trial court;
- (b) a clear and unequivocal rule of law must have been breached;
- (c) a substantial right of the accused must have been adversely affected;

- (d) the accused did not waive the issue for tactical reasons; and
- (e) consideration of the error is “necessary to do substantial justice.

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). All five factors must be present, and the error must be so grievous that it affected the outcome of the trial. Id. at 283.

In the instant case, the Defendant has made no attempt to argue that his issue is not waived. Moreover, the record does not demonstrate that a clear and unequivocal rule of law was breached. Ms. Ross relied upon her own expertise and experience in examining children of alleged sex abuse. See State v. Stevens, 78 S.W.3d 817, 833 (Tenn. 2002) (rigid application of the McDaniel factors may or may not be necessary depending upon the issue, the expert’s expertise, and the subject of the expert’s opinion). Indeed, the determining factors are whether the witness is qualified to give an informed opinion on the subject at issue and whether the reasoning or methodology underlying the expert’s opinion is sufficiently reliable. Id. at 834. Notably, “the court may make a finding of reliability if the expert’s conclusions are sufficiently straightforward and supported by a rational explanation which reasonable [persons] could accept as more correct than not correct.” Id. (citations and internal quotations omitted). Ms. Ross was properly qualified to testify as an expert witness and her opinion substantially assisted the jury in understanding the different types of penetration, the injury that can result from each, and what children of sexual abuse are likely to understand about their bodies. See State v. Frederick Leon Tucker, No. M2005-00839-CCA-R3-CD, 2006 WL 547991, at *7 (Tenn. Crim. App., Mar. 7, 2006). See also Tenn. R. Evid. 702, 703; McDaniel, 955 S.W.2d at 266. Consequently, we decline plain error review.

II. Jury instructions

The Defendant next contends that the trial court erred in charging the jury that all the elements of the offense of child rape could be met if the Defendant “acted either intentionally, knowingly or recklessly.” The Defendant argues that the inclusion of recklessness impermissibly lessened the State’s burden of proof.

The law in Tennessee is well-settled: “[A] defendant has a right to a correct and complete charge of the law so that each issue of fact raised by the evidence will be submitted to the jury upon proper instructions.” State v. Farner, 66 S.W.3d 188, 204 (Tenn. 2001) (citations omitted). The law further requires that all of the elements of each offense be described and defined in connection with that offense. State v. Cravens, 764 S.W.2d 754, 756 (Tenn. 1989); State v. Ducker, 27 S.W.3d 889, 899 (Tenn. 2000). A criminal defendant denied a correct and complete charge of the law is deprived of the constitutional right to a jury trial, which subjects the erroneous jury instruction to a harmless error analysis. An appellate court may consider an instruction prejudicially erroneous “only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law.” State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005) (citing State v. Vann, 976 S.W.2d 93, 101 (Tenn. 1998)).

We acknowledge a split of authority within our Court on this issue. In State v. Chester Wayne Walters, No. M2003-03019-CCA-R3-CD, 2004 WL 2726034 (Tenn. Crim. App., Nashville, Nov. 30, 2004), perm. to appeal denied, (Tenn. Mar. 21, 2005), this Court stated that the elements of rape of a child are unlawful sexual penetration of the victim and the victim being less than thirteen. The unlawful sexual penetration of the victim was categorized as both nature of the conduct and result of the conduct. 2004 WL 2726034, at *13. The panel also held that the victim's age element was a circumstance surrounding the conduct. Id. Because the crime of child rape contained all three conduct elements, a jury could find the defendant guilty by determining the defendant acted intentionally, knowingly, or recklessly. Id. at *14. The opposing view is contained in State v. Weltha Womack, No. E2003-02332-CCA-R3-CD, 2005 WL 17428 (Tenn. Crim. App., Knoxville, Jan. 4, 2005). Therein, a panel of this Court held that sexual penetration as used in the offense of aggravated rape was a nature of conduct element. 2005 WL 17428, at *9. The Womack Court determined that the inclusion of recklessness in the jury instruction was reversible error in permitting a conviction based on reckless penetration. Id.

Our supreme court has not specifically addressed the issue. Even if this panel were to conclude that the jury instructions were erroneous in this case, in our view the error would be harmless beyond a reasonable doubt. The evidence was legally sufficient to support the child rape convictions, the prosecution argued only intentional penetration, and a defense of reckless penetration was never raised. See State v. Homer Alson Maddin, III, 192 S.W.3d 558, 562 (Tenn. Crim. App. 2005). The Defendant denied that he ever touched the vaginal area of the victim "by accident, on purpose, or anything." The jury instruction neither misled the jury nor prejudicially affected the judgment or the judicial process. Accordingly, this issue does not provide the Defendant relief.

III. Sufficiency of the evidence

The Defendant next claims that the evidence contained in the record is insufficient to support a finding by a rational trier of fact that he is guilty beyond a reasonable doubt of rape of a child.³ To support this assertion, the Defendant argues that the State failed to prove "sexual penetration," a required element of child rape. The Defendant asserts that, "[w]hile [the victim] testified to an act in which the Defendant stuck his penis in her," the only evidence of penetration submitted at trial was the medical testimony of Sue Ross. The Defendant further submits that the medical testimony admitted at trial "showed only a mere possibility of an injury to the area of the victim's vagina" and, therefore, would support, at most, a conviction for attempted child rape. The State argues that sexual penetration was proved beyond a reasonable doubt, citing to the testimony of the victim and supported by the photographs admitted into evidence.

³ In the issue as posed, the Defendant also challenges the sufficiency of the evidence supporting his aggravated sexual battery convictions. However, his entire argument centers around the lack of sexual penetration, a required element of child rape. Therefore, we will not address the other requisite elements for a conviction of child rape or for aggravated sexual battery.

Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant’s challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State’s witnesses and resolves all conflicts in the evidence in favor of the prosecution’s theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

The offense of which the Defendant was convicted, child rape, requires the prosecution to prove the element of “sexual penetration.” Tenn. Code Ann. §§ 39-13-503, -522. Our criminal code defines “sexual penetration” for the purposes of these offenses, in relevant part, as “any . . . intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of the victim’s, the defendant’s, or any other person’s body” Tenn. Code Ann. § 39-13-501(7).

The Defendant’s sufficiency argument fails to gain him relief. The victim and the Defendant testified that the victim spent weekends and summer vacation at the Defendant’s home and that, at times, they were alone. The medical expert, pediatric nurse practitioner Sue Ross, testified that, though the results of the medical examinations were normal, penetration could have occurred consistent with these results. In fact, she stated that clear, incontrovertible evidence of penetration into the vagina is only present in three to five percent of cases. Our supreme court has recognized that “[t]here is . . . ‘sexual penetration’ in a legal sense if there is the slightest penetration of the sexual organ of the female. . . . It is not necessary that the vagina be entered or that the hyman be ruptured; the entering of the vulva or labia is sufficient.” Hart v. State, 21 S.W.3d 901, 905 (Tenn. 2000); see also State v. Bowles, 52 S.W.3d 69, 74 (Tenn. 2001). Moreover, the photographs provide circumstantial evidence pointing to the Defendant’s rape of the victim. “The occurrence of penetration, even though penetration is statutorily defined, is a question of fact.” Bowles, 52 S.W.3d at 74.

After considering all the evidence in the light most favorable to the State, we determine that the Defendant has failed to demonstrate that the jury was presented with insufficient evidence at trial for any reasonable trier of fact to determine that he sexually penetrated the victim. See, e.g., State v. Charles L. Williams, No. M2005-00836-CCA-R3-CD, 2006 WL 3431920, at *15-17 (Tenn. Crim. App., Nashville, Nov. 29, 2006). Accordingly, we conclude that the record contains sufficient evidence to support the jury's conclusion that the Defendant is guilty beyond a reasonable doubt of child rape.

IV. Sentencing

Finally, the Defendant argues that he was improperly sentenced. Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b);⁴ State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court's findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

The Tennessee legislature recently amended several provisions of the Criminal Sentencing Reform Act of 1989, those changes becoming effective June 7, 2005. The Defendant's crimes

⁴ We are using the statutes in effect at the time the Defendant was sentenced for the reasons stated herein.

occurred prior to that date, and he was sentenced after it. As such, the Defendant could have elected to be sentenced under the revised Act by executing a waiver of his ex post facto protections. See Tenn. Pub. Acts ch. 353, § 18. He did not execute such a waiver, however, and thus was properly sentenced under the 2003 codification of the Act. That codification violated the Supreme Court's requirement that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The statutory maximum "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Blakely v. Washington, 542 U.S. 296, 305-306 (2004). As such, a trial judge may impose a sentence that exceeds the presumptive sentence based only on the fact of a defendant's prior conviction(s) or on other enhancement factors found by the jury or admitted by a defendant. Id. at 301-04.

At the time of the sentencing hearing, the Defendant was sixty-one years old. He had completed high school, had been married ten times, and had fathered three children. The Defendant was self-employed most of his life, working as a musician. He also worked periodically as a truck driver. The presentence report reflects that the Defendant's criminal history includes convictions for felony failure to support, possession of a prohibited weapon, and embezzlement. It also appears in the report that the Defendant was guilty of bigamy: the marriage between the Defendant and the victim's grandmother was annulled due to the fact that the Defendant was still married to another woman. He also denied any wrongdoing, claiming that the victim's grandmother was seeking to destroy him. At the sentencing hearing, the Defendant affirmed that he was convicted of automobile theft as a juvenile and that he had previously violated parole. He also believed he was convicted because his attorneys conspired against him.

In reviewing the trial court's decision, we conclude that the trial court considered the appropriate sentencing principles and relevant facts and circumstances. Thus, the judge's decision is presumptively correct. The trial court enhanced the Defendant's sentence based solely on the Defendant's history of criminal convictions, two felonies, one misdemeanor, and a prior juvenile adjudication for automobile theft (which was admitted to by the Defendant). See Tenn. Code Ann. § 40-35-114. The trial judge placed significant weight on the Defendant's criminal record.

The trial court applied no mitigating factors in determining the Defendant's sentence. See Tenn. Code Ann. § 40-35-113. The trial judge rejected the Defendant's request for mitigation based upon his medical condition (diabetes, high blood pressure, and ulcers), determining that medication could address his conditions and that the proof did not establish that these conditions were "a substantial hardship" on the Defendant. The trial court also did not consider the Defendant's age as sufficient to warrant reduction in his sentence. Likewise, the court placed no weight on the Defendant's designation as a trustee at the jail.

Moreover, consecutive sentencing was permitted pursuant Tennessee Code Annotated section 40-35-115(5):

The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims.

Here, the Defendant was convicted of four offenses involving sexual abuse of a minor, and the trial court considered the aggravating circumstances surrounding his conduct. The trial court properly relied on the presentence report and victim impact statement in concluding that the victim suffered physical and mental damage from the abuse. The victim stated that she was afraid of older men, her grades had been affected, and she had received counseling.

We conclude that the trial court properly sentenced the Defendant to consecutive terms and was within its discretion to consider, but not apply, his proposed mitigating factors. The trial court did not err in sentencing the Defendant.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

DAVID H. WELLES, JUDGE